

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

LAUREN G.,

Claimant,

vs.

**EASTERN LOS ANGELES REGIONAL
CENTER,**

Service Agency.

OAH Case No. L 2006060495

**DECISION DENYING
CLAIMANT'S APPEAL**

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on August 7, 2006, in Alhambra.

Claimant was represented by Victoria Baca, Executive Director, Foundation for Mexican American Services, Inc.¹

The Eastern Los Angeles Regional Center (ELARC or Service Agency) was represented by Felipe Hernandez, Chief Consumer Services.

The parties presented opening summaries, testimonial and documentary evidence, and closing arguments. The record was closed and the matter submitted for decision at the conclusion of the hearing.

ISSUE

Does Claimant have a developmental disability (epilepsy), from which she is substantially disabled, entitling her to eligibility for regional center services?

EVIDENCE RELIED UPON

Documentary: Service Agency exhibits 1-11; Claimant exhibit A.

Testimonial: Dr. Richard Jacobson, ELARC consulting physician; Claimant's mother.

¹ Claimant and her family are referenced in a manner intended to protect their privacy.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant is a nine year-old girl on whose behalf regional center services from the Service Agency are requested on the basis of her diagnosis of epilepsy.

2. By a Notice of Proposed Action, dated June 6, 2006, the Service Agency gave written notice of its denial of Claimant's request, stating its staff had concluded that although Claimant suffers from epilepsy, her seizures are under control and are not substantially disabling.

3. A Fair Hearing Request on Claimant's behalf was submitted, on June 14, 2006, which timely appealed the Service Agency's denial of eligibility and requested the hearing that ensued.

Claimant's Background and Early Development

4. Claimant was born healthy and without incidents. At the age of seven months, however, she was diagnosed with Leukemia. She received a bone marrow transplant, chemotherapy and radiation treatments. She is considered to be in remission at this time. Claimant met the early developmental milestones in fairly typical intervals. At the age of 42 months, Claimant had a seizure, and thereafter began to have seizure activity at the rate of several per day. She was subsequently diagnosed with epilepsy.

5. Claimant resides with her biological mother, and her two younger siblings. According to Service Agency documents, Claimant has limited contact with her biological father, who does not live with the family.

6. Claimant is currently in the fourth grade within the Montebello Unified School District (MUSD or the District). She receives special education services due to her epilepsy and is enrolled in a special day class. In addition, she has participated in adapted physical education (APE), occupational therapy (OT), and a speech and language program. Her last Individualized Education Program (IEP) on file is dated March 29, 2006.

Claimant's Diagnosis of Epilepsy

7. The parties do not dispute that Claimant has been diagnosed with epilepsy.

8. Claimant's seizure activity is presently under control. The seizures she has experienced are classified as partial complex seizures. Claimant has been prescribed Tegretol, Topamax and Depakote for her seizures, but she no longer takes Topamax. Her last seizure was well over one year ago.

The Service Agency's Assessment of Claimant

9. In early 2006, Claimant was referred to the Service Agency by District staff due to her epilepsy diagnosis and suspected mental retardation.² In February 2006, an initial psycho-social intake assessment was completed by Service Agency staff, and Claimant's mother provided information about her daughter's condition and level of disability for the completion of a Client Development Evaluation Report (CDER). This process is referred to as the "intake process."

10. The Service Agency thereafter referred Claimant to clinical psychologist Thomas L. Carrillo, Ph.D., for a psychological evaluation, which was conducted on February 28, 2006. Dr. Carrillo interviewed Claimant, her mother, and made clinical observations of Claimant. Dr. Carrillo also conducted formal testing of Claimant, which included the following results: Wechsler Intelligence Scale for Children-Fourth Edition (WISC IV) full scale composite IQ score of 81 (consistent with low normal intellectual ability); and a Vineland Adaptive Behavior composite score of 58 (indicative of mild overall adaptive deficits). In his psychological evaluation report, Dr. Carrillo describes Claimant's receptive, expressive and written language abilities to be within the mild range of delay. Without any other explanation, Dr. Carrillo concludes in his report that Claimant has an Axis I diagnosis of a Learning Disorder Not Otherwise Specified; he makes no Axis II diagnosis.³

11. On or about April 24, 2006, Dr. Richard Jacobson, a Service Agency consulting physician, performed a physician record review of Claimant's file. In a written chart note, Dr. Jacobson documents how well her seizures have been controlled, and concludes that Claimant is therefore not eligible for regional center services.

12. On May 19, 2006, an unidentified Service Agency psychologist performed a psychological record review of Claimant's file, including the above described records, Claimant's most recent IEP, and other pertinent medical records. That Service Agency psychologist concluded in a chart note written that day that Claimant was "not eligible" The apparent reasons for that conclusion were that Dr. Carrillo had made no Axis II diagnosis, Claimant's seizures were under control, and that Claimant "scored in the low average cognitive range per Dr. Carrillo's report."

13. Based on the above, the Service Agency's Interdisciplinary Assessment Team concluded, by or before June 6, 2006, that Claimant was not eligible for services, as described above in Factual Finding 2.

² Claimant does not contend in this matter that she is mentally retarded.

³ According to the *Diagnostic and Statistical Manual of Mental Disorders* (fourth edition) (DSM-IV), published by the American Psychiatric Association. Axis I covers diagnoses of clinical disorders; Axis II covers diagnoses of personality disorders or mental retardation.

14. Dr. Jacobson testified that the information provided to the Service Agency by Claimant's mother during the intake process indicated to him that Claimant's epilepsy is not substantially disabling, e.g. it has not substantially depressed her cognitive skills, her communication skills, or her self-help skills. Dr. Jacobson also testified that Claimant's last few IEPs show her improvement in many areas at school, and that, overall, her epilepsy is not substantially interfering with Claimant's education or learning.

15. Notwithstanding Dr. Carrillo's diagnosis, it was not established that Claimant has a learning disorder. Dr. Carrillo does not explain in his report how he arrived at that conclusion, and Dr. Jacobson's testimony did not provide any further elaboration. Claimant's school district has not diagnosed her as having a learning disability, even though she receives special education services there (due to her epilepsy). While her most recent IEP indicates that her performance on standardized testing may not be best indicator of her true ability, the identified cause is her temper tantrums and not a learning disorder. None of Claimant's other medical providers has made such a diagnosis.

Claimant's Assessments and Related Information

16. An October 2005 report from Claimant's pediatric cardiologist, Dr. Elizabeth R. De Oliveira, includes an "impression" that Claimant has a "developmental delay." No further elaboration was provided, including the degree or extent to which the developmental delay has disabled Claimant. Dr. De Oliveira notes in her report that Claimant's cardiovascular system is unremarkable but that Claimant is overweight. Dr. De Oliveira suggests that the weight problem is related to Claimant's diet, although she also notes that a secondary cause could not be ruled out at that time. Dr. De Oliveira makes no suggestion, however, that Claimant's weight problems are caused by her seizure medications.

17. A November 2005 report from the office of Claimant's neurologist, Dr. Charles E. Imbus, documents complaints that Claimant was persistently wetting the bed, was misbehaving, and was dysphoric (unwell or unhappy). The report was prepared by Dr. Imbus's physician assistant (P.A.), and approved by Dr. Imbus. The report does not specifically link any of the noted complaints with Claimant's seizure medications. The report does not comment on the extent and degree to which Claimant's epilepsy has disabled her. However, Dr. Imbus's P.A. does note in the report that Claimant's "gait was normal, and she was able to maintain good balance." The P.A.'s description of his interaction with Claimant indicates she was also able to communicate with him in a manner appropriate to her age.

18. Claimant's IEPs from 2005 and 2006 were also presented. They state that Claimant is "diagnosed with seizure disorders which adversely affect her educational performance." The two IEPs are also consistent in recommending that she be in a small class setting with constant reminders and assistance in order to develop her reading and math skills. The IEPs also consistently document that Claimant at times engages in "some non-compliant behaviors," but that overall "she gets along with her peers."

19. The 2005 IEP documents that Claimant “enjoys social interactions and often makes people laugh with her worldly comments.” The 2005 IEP also documents that in 2005, Claimant was dismissed from the speech and language program, because she “is exhibiting age appropriate skills within the classroom setting at this time.”

20. The 2006 IEP (executed when Claimant was in the third grade) documents Claimant’s present levels of performance as follows: she has “good communication skills”; she reads on a second grade level; her reading comprehension is high first grade; her math is high first grade; her written language is “about first grade;” she has difficulties with memory and telling time; her communication is “age appropriate”; and her self-help is “age appropriate.” The 2006 IEP also notes that in or about March 2006, Claimant was dismissed from OT for unspecified reasons.

21. Claimant’s mother testified about her daughter’s condition and present level of disability. Claimant’s mother is herself an elementary school teacher and familiar with how typical children Claimant’s age behave and perform at school. Her primary concern now is Claimant’s sometimes noncompliant attitude and temper tantrums. Claimant’s mother testified that Claimant can become moody, irritable, and physically aggressive (with her little brother), which she believes are side-effects from Claimant’s seizure medications. She also believes her daughter is less mature than her peers and is not able to effectively communicate and socialize with them. Claimant’s mother also believes the medications are causing an increase in her daughter’s appetite, which she believes is making Claimant gain weight and thereby decreasing her mobility. According to her mother, it is the combination of her epilepsy and the seizure medications she takes that is substantially disabling Claimant.

22. It was not established that there is a casual connection between Claimant’s seizure medications and the disabilities attributed to her in Factual Finding 21 above. The testimony of Claimant’s mother was not persuasive, because she is not qualified to establish such a medical link. Her testimony along those lines was anecdotal, and there was no evidence presented from any medical professional that established such a link. The 2006 IEP does contain a health maintenance recommendation from Rodrigo C. Sanchez, a District nurse, which lists a number of “common” side-effects from seizure medications that Claimant was then taking. However, that document appears to be more generic than specifically tailored to Claimant’s particular situation. Moreover, there is an imprecise relationship between the noted side-effects and the actual observations of Claimant described by her mother. Further, the document was prepared in April 2003, well before subsequent changes to Claimant’s medication regimen described in her more recent medical records. Therefore, that document is not reliable.

*Findings Regarding the Extent of Claimant's Disability Due to Epilepsy*⁴

23. Cognitive Functioning. It was not established that there is a major impairment of Claimant's cognitive functioning due to her epilepsy. Dr. Carrillo's formal testing indicated that Claimant's cognitive skills are within the low normal range, which is not necessarily indicative of the presence of a major cognitive impairment. Claimant's poor performance on standardized testing at school does not establish a major cognitive impairment, because her last two IEPs state that her performance "may not be the best indicator of her true (cognitive) ability" Although the 2005 IEP linked her poor performance on that testing to both her seizure disorder and temper tantrums, the 2006 IEP only lists her temper tantrums as the cause. While Claimant's mother blames the temper tantrums on her seizure medication, such a link was not sufficiently established.

24. Social Functioning. It was not established that there is a major impairment of Claimant's social functioning due to her epilepsy. There is evidence indicating Claimant's socialization is impaired to some extent. For example, Claimant's mother testified that her daughter has a difficult time relating to other children her age who are not her classmates, has few friends and lacks social skills. She also describes her daughter as immature. During the intake process, Claimant's mother indicated that Claimant is able to participate in social interactions when initiated by others, but is unable to do so when she is required to initiate them. Claimant's mother also testified that her daughter's poor behaviors impact her socialization. As discussed above, while Claimant's mother believes the seizure medications are causing those behavior problems, it was not established that there is such a link. Moreover, there is no other source of evidence corroborating the testimony of Claimant's mother regarding her daughter's social deficiencies. To the contrary, the only other evidence presented by Claimant is her 2006 IEP, which documents that although she has noncompliant issues, she generally gets along with her peers. Thus, there is conflicting evidence regarding whether Claimant's socialization is impaired to a major extent, and insufficient evidence enabling Claimant to link the apparent problems with her epilepsy.

25. Receptive and Expressive Language. Claimant has some level of functional limitation in this area. Claimant's mother testified that her daughter's speech is "immature," "baby-ish," and subjects her to ridicule by other children. In addition, Dr. Carrillo described in his report Claimant's overall receptive and expressive language ability as within the mild range or delay. However, the evidence did not establish that Claimant's functional limitation in this area is significant. For example, the testimony of Claimant's mother on this issue was not corroborated. With regard to Dr. Carrillo, it cannot be concluded that a "mild" delay equates to a "significant" limitation. During the intake process, Claimant's mother described her daughter's ability in a way that is inconsistent with a significant limitation, as follows: she is able to speak in complete sentences, readily understandable to others; she is able to express herself and her feelings; and she is able to engage in conversation. Claimant's 2006 IEP describes her communication development as "age appropriate," and she was previously

⁴ These findings track the categories set forth in the pertinent statutes and regulations, as discussed in more detail below in Legal Conclusion 4.

dismissed from her school's speech and language program in 2005 for that reason. Dr. Imbus's P.A. felt that he was able to communicate with Claimant during an office visit. None of Claimant's other records which were presented indicate any problems with her receptive or expressive language abilities. The totality of the evidence does not establish that Claimant's functional limitation in this area is significant.

26. Learning. Claimant has a significant functional limitation in this area. As discussed above, it is undisputed that she receives special education services at school because of her epilepsy. Her last two IEPs and the testimony of her mother established that Claimant is approximately two grade levels behind in math, reading, and reading comprehension. She has extreme difficulty with multiplication; she cannot tell time; she cannot make change. In order for her to learn, things must be constantly repeated to her. These problems depict a significant functional limitation in learning.

27. Self-care. Claimant has some level of functional limitation in this area. Claimant's mother is primarily concerned about her daughter's persistent bed-wetting, although she also depicts her daughter as being limited in some self-care functions. However, the evidence weighs against finding that Claimant's functional limitation in this area is significant. For example, it was not established that Claimant's bed-wetting is caused by her seizure medications, and thus there is no link between that problem and her epilepsy. In addition, Claimant's mother during the intake process described Claimant's self-care abilities in a way that is inconsistent with a significant limitation, as follows: she is able to use eat utensils, with some spillage; she is fully toilet-trained and has complete bladder and bowel control (except for her bed-wetting); she is able to maintain her personal hygiene with minimal supervision, including bathing; she needs some help with dressing and undressing (when buttons and zippers are involved); she is able to order food in public. Claimant's mother also testified that her daughter is able to brush her own hair with some help and can dress herself. Both her 2005 and 2006 IEPs assess Claimant's self-care skills as "age appropriate." She takes her medications, with supervision.

28. Mobility. Claimant has some level of functional limitation in this area. For example, Claimant contends that her need for APE services at school signals a significant functional limitation in this area. More specifically, Claimant's 2006 IEP contains an APE report done in February of that year, in which Claimant's gross motor development was rated as being "very poor." In many diverse areas of APE activity, Claimant was assessed as up to four years behind in age equivalence. Her APE teacher concludes in the report that "[t]he trauma she (Claimant) has been through in her life has affected her motor skills." However, just because her gross motor development is delayed does not mean that her mobility is functionally limited significantly. To the contrary, there is evidence indicating Claimant's mobility is not significantly limited. For example, Claimant was dismissed from OT at school, which focused on her fine motor skills related to education. Dr. Imbus's office has assessed Claimant as having a normal gait and being able to maintain good balance. Claimant's mother indicated during the intake process that Claimant knows her way around and moves about successfully in both familiar and unfamiliar settings. Claimant's mother also contends that her obesity (which she believes is related to her seizure medications)

makes it more difficult for Claimant to run and thus limits her mobility. However, since it was not established that her seizure medications cause this problem, her weight problems cannot be attributed to her epilepsy. Overall, it was not established that Claimant's ability to access her community is significantly limited. The totality of the evidence does not establish that Claimant has a significant functional limitation in this area.

29. Self-direction. It was not established that Claimant has a significant functional limitation in this area. Claimant's mother testified that her daughter plays with dolls on her own, can get items she wants on her own initiative, and is able to follow through on ideas. Although Claimant used to sometimes wander away, she has not since her seizure medication regimen was changed.

30. Capacity for Independent Living. Claimant contends this area of life activity is not applicable because Claimant is only nine years old. In any event, there was insufficient evidence presented which established that Claimant has a significant functional limitation in this area, for a person her age.

31. Economic self-sufficiency. Claimant contends this area of life activity is not applicable because Claimant is only nine years old. In any event, there was insufficient evidence presented which established that Claimant has a significant functional limitation in this area, for a person her age.

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.)⁵ An administrative "fair hearing" is available under the Lanterman Act to appeal a regional center's denial of a service request. (§§ 4700-4716.) Claimant properly appealed from the Service Agency's denial of her service request and thus jurisdiction was established. (Factual Findings 1-3.)

2A. Where an applicant seeks to establish eligibility for government benefits or services, the burden of proof is on her. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).) The standard of proof in this case requires proof to a preponderance of the evidence, pursuant to Evidence Code section 115, because no other law or statute (including the Lanterman Act) requires otherwise.

2B. With regard to the issue of one's eligibility for regional center services, "the Lanterman Act and implementing regulations clearly defer to the expertise of the DDS (California Department of Developmental Services) and RC (regional center) professionals' determination as to whether an individual is developmentally disabled." (*Mason vs. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1127.) In *Mason*, the court focused on whether the claimant's expert witnesses' opinions on eligibility "sufficiently refuted" those expressed by the regional center's experts that claimant was not eligible. (*Id.*, at p. 1137.)

⁵ All further statutory references are to the Welfare and Institutions Code, unless noted.

2C. Based on the above, Claimant in this case has the burden of proving by a preponderance of the evidence that her evidence regarding eligibility is more persuasive than that adduced by the Service Agency.

Claimant has a Qualifying Condition

3A. An applicant is eligible for services under the Lanterman Act if she can establish that she is suffering from a substantial disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism or what is referred to as the “fifth category” (a condition similar to mental retardation or which requires treatment similar to that required by those who are mentally retarded). (§ 4512, subd. (a).) A qualifying condition must also onset before one’s 18th birthday and continue indefinitely thereafter. (§ 4512; Cal. Code Regs., tit. 17, § 54000, subds. (a), (b)(1), and (b)(3).)

3B. In this case, there is no dispute that Claimant suffers from epilepsy, that it onset before her 18th birthday and that her condition will indefinitely continue. (Factual Findings 4-8.) However, as discussed below, having a qualifying condition does not alone establish eligibility for regional center services.

Claimant Did Not Establish that She is Substantially Disabled

4A. As referenced above, the qualifying condition must also cause a substantial disability. (Welf. & Inst. Code, § 4512, subd. (a); Cal. Code Regs., tit. 17, § 54000, subd. (b)(3).) A “substantial disability” is defined by California Code of Regulations, title 17, section 54001, subdivision (a), as follows:

- (1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and
- (2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person’s age:
 - (A) Receptive and expressive language;
 - (B) Learning;
 - (C) Self-care;
 - (D) Mobility;
 - (E) Self-direction;

- (F) Capacity for independent living;
- (G) Economic self-sufficiency.⁶

4B. In this case, applying the evidence to the above described categories reveals Claimant is not substantially handicapped by virtue of her epilepsy. First, it was not established that Claimant's epilepsy has resulted in a major impairment of either her cognitive or social functioning, as required by California Code of Regulations, title 17, section 54001, subdivision (a)(1). Second, it was not established that there currently exists a significant functional limitation in three or more of the listed areas of major life activity; she only established such a significant limitation in one area, i.e. learning. Although there was some evidence of limitation in a few of the other areas of major life activity, there was insufficient evidence to either establish that the limitation is significant or is caused by her epilepsy. (Factual Findings 9-31.)

5. Claimant did not meet her burden of establishing that she is eligible for regional center services, in that her developmental disability (epilepsy) is not currently substantially disabling. (Factual Findings 1-31.)

ORDER

Claimant LAUREN G. failed to establish eligibility for services from the Service Agency, EASTERN LOS ANGELES REGIONAL CENTER. Claimant's appeal of the Service Agency's determination that she is not eligible for services is therefore DENIED.

DATED: August 21, 2006

ERIC SAWYER,
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision pursuant to Welfare and Institutions Code section 4712.5, subdivision (a). Both parties are bound by this decision. This decision may be appealed to a court of competent jurisdiction within 90 days of receipt of notice of this decision.

⁶ Welfare and Institutions Code section 4512, subdivision (l), defines "substantial disability" similar to that of California Code of Regulations, title 17, section 54001, subdivision (a)(2).